General Aviation Aircraft Insurance: Provisions Denying Coverage for Breaches That Do Not Contribute to the Loss

Derrick J. Hahn

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GENERAL AVIATION AIRCRAFT INSURANCE: PROVISIONS DENYING COVERAGE FOR BREACHES THAT DO NOT CONTRIBUTE TO THE LOSS

DERRICK J. HAHN*

TABLE OF CONTENTS

I. INTRODUCTION .................................. 675
II. INSURANCE POLICY PROVISIONS ............... 678
   A. REPRESENTATIONS ................................ 678
   B. WARRANTIES ................................... 680
   C. EXCLUSIONS .................................... 681
III. JUSTIFICATION FOR EXCLUSIONS ........... 682
   A. USE OF AIRCRAFT .............................. 683
   B. TYPE OF AIRCRAFT .............................. 684
   C. AIRCRAFT AIRWORTHINESS ................... 685
   D. PILOT CERTIFICATION AND QUALIFICATIONS ... 687
IV. TECHNICAL BREACH OF POLICY PROVISION . 690
V. CONTRIBUTE-TO-THE-LOSS STANDARD
   (DOCTRINE) ................................... 692
   A. APPLYING THE CONTRIBUTE-TO-THE-LOSS
      STANDARD ...................................... 693
   B. CASES IN WHICH COVERAGE WAS DENIED .... 696
   C. BURDEN OF PROOF ................................ 700
   D. PUBLIC POLICY .................................. 700
VI. CONCLUSION .................................... 701

I. INTRODUCTION

THE FEDERAL GOVERNMENT, through the Federal Aviation Administration (FAA), promotes and regulates civil aviation in the United States.1 To accomplish this task, the FAA

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1 See FRED A. BIEHLER, AVIATION MAINTENANCE LAW § 1 (1975).
has promulgated a vast array of rules and procedures, called Federal Aviation Regulations (FARs), which govern the certification, maintenance, and operation of aircraft. Because a great portion of these regulations are safety-oriented, aviation insurance policies have come to incorporate one or more provisions that exclude coverage if the aircraft is being operated in violation of FARs. Unfortunately, the FARs are so broad and comprehensive that an accident is very unlikely to occur without either the pilot or the aircraft being in violation of at least one of these regulations.

For cases in which the violation clearly caused or contributed to the loss, little needs to be said regarding the validity of such policy provisions. However, for cases in which the loss is completely unattributable to the violation, forfeiture of coverage seems to be an unjust result. A recent South Dakota case illustrates this issue.

In that case, the pilot, while flying a small single-engine aircraft, had an accident solely due to pilot error. Although no one was injured in the accident, the aircraft was totally destroyed. The insurance company denied coverage on the ensuing claim because the pilot did not have a current medical certificate at the time of the accident, as required by the policy. Even though the pilot's health in no way contributed to the accident, as evidenced by a medical certificate issued four

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4 See Harlow, supra note 2, at 783 (citing Thompson v. Ezell, 379 P.2d 983 (Wash. 1963) and SPEISER, AVIATION TORT LAW § 29:27 (1980)).

5 Courts in several states have not allowed aircraft insurers to deny coverage when the breach of a policy provision did not contribute to the loss. See infra note 14.


7 See id. at 645.

8 See infra note 81 and accompanying text (explaining the purpose and classification of medical certificates).

9 The pilot did hold a third-class medical certificate, although it had expired on July 18, 1990. The accident occurred approximately four months later on November 25, 1990. See Economic Aero Club, 540 N.W.2d at 645.
days later,¹⁰ the court upheld the exclusion and denied coverage.¹¹

Although the regulation requiring all pilots to possess a current medical certificate is nationwide, the effect that not having such a certificate has upon insurance coverage varies drastically depending upon the jurisdiction where the issue is litigated.¹² Even though most policies contain such provisions, a growing number of states will not effectuate the provision if the violation did not contribute to the loss.

At the time of this writing, eight states compose the faction representing this modern trend.¹³ Those states are Colorado, Florida, Hawaii, Illinois, Mississippi, Montana, Texas, and South Carolina.¹⁴ As will be detailed later in this Article, some of these states negate the exclusionary provisions by applying anti-techni-

¹⁰ See id.
¹¹ See id. at 646.
¹² See Dawn R. Gabel, WARRANTIES AND REPRESENTATIONS IN AVIATION INSURANCE: A CONTRIBUTE-TO-THE-LOSS SOLUTION TO THE CONFUSION CREATED BY THE COMMON LAW AND THE STATUTORY RESPONSE, 30 Ariz. L. Rev. 515 (1988). This Article will not attempt to address the choice of law and conflict of law issues that arise in determining where an aircraft insurance case should be litigated and which state's law should be applied.
¹³ Some commentators have characterized the causal connection requirement as the "modern trend." Puckett v. United States Fire Ins. Co., 678 S.W.2d 936, 937 (Tex. 1984). One court responded that "whether this is the modern trend is debatable, as evidenced by the authority cited above. We do believe, however, that it is the better rule to require causation." Id. at 938.
¹⁴ See Bayer v. Omni Aviation Managers, 510 F. Supp. 1204 (D. Mont. 1981) (holding that a causal connection was required between pilot's failure to have medical certificate and the loss before the insurer could deny coverage); American States Ins. Co. v. Byerly Aviation, Inc., 456 F. Supp 967 (S.D. Ill. 1978) (holding that the insurer could not deny coverage despite the fact that an unnamed pilot flew the aircraft absent showing the breach contributed to the loss); Avemco Ins. Co. v. Chung, 388 F. Supp. 142 (D. Haw. 1975) (holding that the insured's failure to possess a current medical certificate would not void coverage unless the failure caused the loss); Fireman's Fund Ins. Co. v. McDaniel, 187 F. Supp. 614 (N.D. Miss. 1960) (holding that the insurer could not deny coverage unless the insured's failure to have pilot license contributed to loss), aff'd per curiam, 289 F.2d 926 (5th Cir. 1961); O'Connor v. Proprietors Ins. Co., 696 P.2d 282 (Colo. 1985) (upholding a policy exclusion denying coverage for a lack of annual inspection because the insured did not prove that such failure was unrelated to the cause of the accident); Pickett v. Woods, 404 So. 2d 1152, (Fla. Dist. Ct. App. 1981) (holding that the insurer could not deny coverage for lack of annual inspection when the cause of the accident was pilot error); South Carolina Ins. Co. v. Collins, 237 S.E.2d 358 (S.C. 1977) (holding that coverage cannot be denied when no causal connection exists between the accident and the insured's lack of a medical certificate); Puckett v. United States Fire Ins. Co., 678 S.W.2d 936 (Tex. 1984) (holding that the insurer could not use the lack of an annual inspection to deny coverage unless it was causally connected to the loss).
This Article begins with an explanation of various insurance policy provisions and how underwriters have used them to limit the risks for which liability is assumed. Part II focuses specifically on aircraft insurance policies and the various provisions contained therein. Some of the more common policy exclusions are described along with the purpose these exclusions serve in the aviation context. The following part explores several recent cases in which technical breaches of aircraft policies precluded coverage even though the breaches did not contribute to the losses. The seemingly unfair results of these cases are then contrasted with cases in which the courts employed a contribute-to-the-loss standard. This approach provided coverage in cases where the breach was proven to be totally unrelated to the loss and denied coverage in those instances where that issue could not be proven. Finally, in conclusion, this Article argues that the contribute-to-the-loss approach is the fairest method for dealing with technical breaches of aircraft policies. This approach continues to recognize the insurer’s interests, while at the same time advancing the public policy interest of providing coverage for insureds.

II. INSURANCE POLICY PROVISIONS

The majority of the chaos over aviation insurance coverage begins with the labels given various provisions within the policy that propose to describe exactly what will and will not be covered. Because the labels given to various provisions can have a dramatic effect on whether coverage will be allowed, some of the basic distinctions between representations, warranties, and exclusions merit discussion.

A. REPRESENTATIONS

In the insurance context, a representation is generally a written or oral statement, not contained in the contract, by an applicant for insurance that induces the insurer to enter into a contract with the applicant. The insurer may use the applicant’s representations to determine the amount of premium to

15 See Gabel, supra note 12, at 521-31.
16 See id. at 515.
17 See BLACK'S LAW DICTIONARY 1301 (6th ed. 1990). A representation in the insurance context is further defined as:
be charged, the circumstances under which coverage will be provided, or if coverage will be extended at all.\footnote{18}{See Robert E. Keeton & Alan I. Widiss, Insurance Law $5.7$, at 567 (1988).}

For cases in which the applicant has fraudulently made material misrepresentations,\footnote{19}{A fact is material when "it would so increase the degree or character of the risk of the insurance so as to substantially influence its issuance, or \textit{substantially affect the rate of premium}." \textit{Id.} at 571 n.17 (quoting Davis-Scofield v. Agricultural Ins. Co., 145 A. 38, 40 (Conn. 1929)).} courts have held that the insurer is not liable for the loss.\footnote{20}{See Keeton & Widiss, supra note 18, at 571.} Even if the misrepresentation was not made fraudulently, courts have still denied coverage if the insurer can prove that the false information was material and that the insurer relied upon it to extend coverage.\footnote{21}{When the following three elements are found, the court has a clear basis to either rescind the contract or allow the insurer's affirmative defense to the claim: An insurer is entitled to relief on the basis that an insured provided incorrect information in an insurance application, when it is proved: (1) that the information was not correct; (2) that the information received was important either to the insurer's decision to insure or to the terms of the insurance contract, (that is, the information was "material"); and (3) that the insurer in fact relied on the incorrect information. \textit{Id.} at 570 (quoting State Farm Mut. Auto. Ins. Co. v. Price, 396 N.E.2d 134, 136 (Ind. Ct. App. 1979). See also Crawford v. Standard Ins. Co., 621 P.2d 583 (Or. Ct. App. 1980)).} Conversely, courts have been disinclined to grant insurers relief for immaterial misrepresentations, irrespective of whether the information was given fraudulently or by innocent mistake.\footnote{22}{See \textit{id.} at 571.} Additionally, some states have enacted legislation to prevent the harsh result of coverage forfeiture when the misrepresentation, although material, in no way contributed to the loss.\footnote{23}{See \textit{id.} at 572.}

The bulk of the representations made for aviation policies are in the form of an aircraft owner's application for insurance. These applications request information regarding total hours

A collateral statement, either by writing not inserted in the policy or by parol, of such facts or circumstances, relative to the proposed adventure, as are necessary to be communicated to the underwriters, to enable them to form a just estimate of the risks. The allegation of any facts, by the applicant to the insurer, or \textit{vice versa}, preliminary to making the contract, and directly bearing upon it, having a plain and evident tendency to induce the making of the policy. The statements may or may not be in writing, and may be either express or by obvious implication.
flown and a breakdown of the types of aircraft flown, as well as the hours in each. The applications also request the certificates and ratings held by the pilot.\textsuperscript{24}

B. Warranties

When representations are incorporated into the insurance contract, they are generally referred to as warranties. Common law characterized warranties as statements or factual descriptions that were incorporated into the policy, related to an insured risk, and were to be literally true or coverage could be denied.\textsuperscript{25} Through the years, using warranties in insurance contracts as conditions precedent to the payment of claims, along with the requirement of literal satisfaction for even the most trivial of provisions, became very widespread.\textsuperscript{26} By merely characterizing every representation as a warranty, insurers were able to avoid paying claims by simply finding a minute discrepancy between the facts and the representations.\textsuperscript{27} This happened so frequently that judges became very upset with insurers who attempted to impose such forfeitures upon unsuspecting insureds through the use of warrantees regarding unrelated issues. Thus, courts began to construe policy language against the insurer, even to the point of distortion.\textsuperscript{28}

\textsuperscript{24} See, e.g., Eastern Aviation & Marine Underwriters, Inc. v. Gilbertson, 379 N.W.2d 567, 570 (Minn. Ct. App. 1985); Ideal Mut. Ins. Co. v. Last Days Evangelical Ass'n, 783 F.2d 1234, 1237 (5th Cir. 1986).

\textsuperscript{25} See KEETON & WIDISS, supra note 18, at 568.

\textsuperscript{26} The courts were eventually called upon to intervene on behalf of policyholders:

\begin{quote}

The effect of such warranty provisions was increasingly to jeopardize the rights of policyholders, no matter how honest and careful they were [in providing information]. As the use of warranties— together with the rule requiring literal satisfaction—was brought to bear on an increasingly large portion of all insured transactions, it led to numerous lawsuits which called upon the courts to consider whether the failure to satisfy what was urged, on behalf of claimants, to be an immaterial warranty should preclude all rights of an insured to coverage.
\end{quote}

\textit{Id.} at 564-65.

\textsuperscript{27} See \textit{id.} at 564.

\textsuperscript{28} The judicial response to many of these warranty provisions was to construe, and sometimes even distort, the policies, language to favor the insureds. This "resulted in a mass of litigation and confused precedent, the like of which cannot be found in any other field of our law." \textit{Id.} at 565 (quoting William R. Vance, \textit{The History of the Development of the Warranty in Insurance Law}, 20 \textit{Yale L.J.} 523, 534 (1911)).
Today, both legislation and judicial decisions have lessened the harsh effect of some of these warranties. The most common type of statute dealing with this issue limits those statements in a policy that can be construed as warranties, rendering those that do not qualify as mere representations. A majority of the states have enacted these contribute-to-the-risk statutes that provide that a misrepresentation will not void coverage unless the misrepresentation was made fraudulently, was material to the acceptance of the risk, or would have caused the insurer not to issue the policy had the insurer known of the misrepresentation. \(^\text{29}\) Furthermore, some states passed anti-technical statutes with contribute-to-the-loss provisions, which prevent an insurer from denying coverage despite a breached condition by the insured, unless that breach was causally related to the loss. \(^\text{30}\)

C. Exclusions

An exclusion in insurance parlance has been defined as a policy provision that eliminates coverage for certain persons, situations, or circumstances, when it would otherwise exist but for the exclusion. \(^\text{31}\) Therefore, exclusions are fundamentally different from representations, warranties, and conditions, in that they are not promises by either the insurer or the insured, but rather statements of what events or uses are outside the boundaries of coverage. \(^\text{32}\) One of the effects of listing policy provisions as exclusions rather than warranties has been to circumvent the materiality and contribute-to-the-loss issues detailed above. By simply labeling what would normally be a warranty as an exclusion, insurers can claim that enforcement of the provision does not forfeit coverage because coverage never existed for the excluded event. \(^\text{33}\)

Exclusions routinely found in aircraft policies deal with pilot qualifications and certification of both pilot and aircraft. Such provisions, for example, will exclude coverage if a loss occurs

\(^\text{29}\) See Gabel, \emph{supra} note 12, at 521.

\(^\text{30}\) See Harlow, \emph{supra} note 2, at 783.


\(^\text{32}\) See Bates, \emph{supra} note 3, at 463.

\(^\text{33}\) See Security Ins. Co. v. Andersen, 763 P.2d 246, 250 (Ariz. 1988). In that case, the court stated that an exclusion is quantitatively different than a condition precedent. Forfeiture of the very thing paid for because of a failure to strictly comply with a condition precedent is disfavored by courts. However, an operative exclusion does not involve a forfeiture because no coverage ever existed for the excluded event. See \emph{id}. 
while the aircraft is being operated in violation of its airworthiness certificate\textsuperscript{34} or "if piloted by a person not properly certified, rated, and qualified under the current applicable Federal Air Regulations for the operation involved."\textsuperscript{35}

As evidenced by the examples in the previous section, the labels given to various policy provisions often determine the outcome of coverage disputes.\textsuperscript{36} Most states seem to have addressed, either through case law or legislation, the most flagrant insurer abuses of strict adherence to representations and warranties to avoid the payment of legitimate claims. However, similar policy provisions denoted as exclusions, having some of the same harsh effects, have for the most part eluded both judicial and legislative oversight.\textsuperscript{37} For that reason, the effect and treatment of policy exclusions will be the primary focus of this note.

\textbf{III. JUSTIFICATION FOR EXCLUSIONS}

Insurance companies rightfully have the ability to limit the risk that they assume by virtue of the insurance contract.\textsuperscript{38} Therefore, aviation policies usually contain numerous exclu-


\textsuperscript{35} Security Ins. Co., 763 P.2d at 248.

\textsuperscript{36} See Gabel, \textit{supra} note 12, at 520-21. The terms used to describe various policy provisions can have a dramatic impact on the insured's coverage as indicated in the following passage:

The outcome of a case very often hinges upon which of these terms a court focuses on when determining the treatment of the particular policy provision in question. The consequences range in severity from complete forfeiture for breach of a coverage provision; to possible forfeiture if the breach of a warranty, sometimes treated as a representation by statutory authority, contributes to the risk assumed; to possible forfeiture for breach which contributes to the actual loss; to non-forfeiture for a misrepresentation which was either not material or not fraudulently made.

\textit{Id.} (citations omitted)

\textsuperscript{37} Because none of the statutes dealing with insurance provisions expressly include exclusions, most states do not require a causal connection between the exclusion and the loss for the insurer to deny coverage. See Bates, \textit{supra} note 3, at 465. However, one state appellate court held that an insurer should not be able to circumvent anti-technical statutes and thereby deny coverage by simply inserting a \textit{condition} in a policy and calling it an \textit{exclusion}. Global Aviation Ins. Managers v. Lees, 368 N.W.2d 209, 212 (Iowa Ct. App. 1985) (emphasis added).

sions\textsuperscript{39} that deny coverage when the insured engages in certain types of operations that are likely to increase the insurer’s risk of loss.\textsuperscript{40} The following are some of the more common exclusions found in aircraft policies that have given rise to litigation.

\section*{A. Use of Aircraft}

Aircraft insurance policies sometimes contain exclusions for aerobatic flights.\textsuperscript{41} Aerobatic flight is defined as “an intentional maneuver involving an abrupt change in an aircraft’s attitude, an abnormal attitude, or abnormal acceleration, not necessary for normal flight.”\textsuperscript{42} Due to the nature of these maneuvers, regulations further require that occupants engaged in aerobatic flight maneuvers wear parachutes.\textsuperscript{43}

Understandably, courts have upheld policy provisions excluding coverage for aircraft that sustain a loss while performing aerobatic maneuvers and have not required the insurers to prove a causal connection between the breach of the policy provision and the loss.\textsuperscript{44}

Policies also usually contain exclusions for aircraft that suffer a loss while being used for an unlawful purpose, during conversion, or while carrying explosives.\textsuperscript{45} Likewise, courts have given effect to such provisions and denied coverage without requiring the insurer to prove a causal connection between the policy breach and the loss.\textsuperscript{46}

Because these provisions go directly to the intentional use of the aircraft, courts have been inclined to uphold provisions which allow insurers to exclude coverage for operations which tend to increase the risk of loss.

\textsuperscript{39} See, e.g., Harlow, supra note 2 (explaining various aircraft policy exclusions and how the courts have applied them).

\textsuperscript{40} See id. at 782-83.

\textsuperscript{41} See id. at 790.

\textsuperscript{42} 14 C.F.R. § 91.303 (1998).

\textsuperscript{43} The FARs stipulate that “[u]nless each occupant of the aircraft is wearing an approved parachute, no pilot of a civil aircraft carrying any person (other than a crewmember) may execute any intentional maneuver that exceeds— (1) A bank of 60 degrees relative to the horizon; or (2) A nose-up or nose-down attitude of 30 degrees relative to the horizon.” 14 C.F.R. § 91.307(c) (1998) (emphasis added).


\textsuperscript{45} See id. at 791-93.

\textsuperscript{46} See id.
B. TYPE OF AIRCRAFT

In addition to hull coverage, aircraft insurance policies often provide coverage for personal injuries that occur while the insured is an occupant of a "non-owned" aircraft. As the following case indicates, however, this type of coverage is limited to those aircraft having a "Standard" Airworthiness Certificate, as opposed to an "Experimental" or "Special" Airworthiness Certificate.47

The Oklahoma Supreme Court, in Avemco Insurance Co. v. White,48 denied coverage under a nonowned aircraft policy provision that excluded any loss that occurred in an aircraft that lacked a "Standard" Category Airworthiness Certificate.49 In that case, the insured and his passenger were both killed while flying an aircraft that had been issued an Experimental Airworthiness Certificate.50 White's estate later sought indemnification for a negligence suit the passenger's estate brought against it. In recognizing the insurer's right to place valid limits on its risk, the court stated that the exclusion was not contrary to public policy because "[t]he risk of an accident while flying an airplane without a 'Standard' Airworthiness Certificate is clearly greater than the risk of an accident while flying an aircraft with one."51

Similarly, in United States Aviation Underwriters, Inc. v. Sunray Airline, Inc.,52 the court denied nonowned aircraft coverage by upholding a policy exclusion for losses that occur in a turbine-powered aircraft.53 In that case an accident occurred while a pilot for the insured was flying a turbine-powered aircraft that

47 "Standard Airworthiness Certificates are issued for airplanes type certificated in the normal, utility, acrobatic or transport categories. If the airplane is new and manufactured under a Production Certificate, no further inspection is required for issuance.... Experimental Certificates are issued for newly designed, modified, or equipped airplanes." BIEHLER, supra note 1, § 18, at 28-29. "Special Airworthiness Certificates may be issued for airplanes of non-standard design, military surplus, of a new type, or malfunctioning or damaged airplanes needing to be flown to a place where repairs can be accomplished." Id. at 29.


49 See id. at 589; seeinfra notes 60, 62 (explaining requirements for and duration of standard airworthiness certificates).

50 See Avemco Ins. Co., 841 P.2d. at 589; 14 C.F.R. § 91307(c) supra note 43 (explaining the requirements for experimental airworthiness certificates).

51 See Avemco Ins. Co., 841 P.2d at 591.


53 See id. at 1312.
the insured did not own. When a passenger brought suit against the insured for injuries suffered, the court upheld the provision stating that losses involving turbine-powered aircraft, helicopters, and seaplanes were all clearly excluded from the policy from its inception. Despite claims by the insured that the design of the engines did not contribute to the crash, the court reasoned that the cause was irrelevant because coverage under the policy never existed for that type of aircraft. Further, the court added that a distinction can be drawn between that case and instances when an insured aircraft might remain covered despite the breach of the policy for flying the aircraft after the annual inspection has expired. In those cases, because the aircraft was covered initially, if the breach of the policy provision requiring current inspections does not contribute to the loss, coverage would still be available.

C. Aircraft Airworthiness

Another common exclusion found in aircraft policies relates to the aircraft's airworthiness certificate. The FAA normally issues a standard airworthiness certificate at the time the aircraft is manufactured. FARs not only require that the certificate remain in the aircraft, but also that it be displayed in a conspicuous manner for all passengers and crew. Although the actual airworthiness certificate remains unchanged, it is not considered current and in force if an annual inspection has not been

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54 See id. at 1310. The aircraft in that case crashed as a result of fuel starvation. See id.
55 See id. at 1312.
56 See id. at 1310-11.
57 See id. at 1311-12 (distinguishing Pickett v. Woods, 404 So. 2d 1152 (Fla. Dist. Ct. App. 1981)).
58 See Harlow, supra note 2, at 785.
59 See Biehler, supra note 1, §§ 17-18.
60 The FARs provide that "no person may operate a civil aircraft unless it has . . . [a]n appropriate and current airworthiness certificate." 14 C.F.R. § 91.203(a)(1) (1998) (emphasis added). The regulations further provide that "[n]o person may operate a civil aircraft unless the airworthiness certificate . . . is displayed at the cabin or cockpit entrance so that it is legible to passengers or crew." 14 C.F.R. § 91.203(b) (1998).
61 An annual inspection is accomplished by first removing all aircraft access panels and inspection plates to facilitate a methodical, visual inspection to determine the aircraft's structural integrity. All components and systems are operationally checked as are critical dimensional tolerances. Compression tests are performed on combustion engines to ascertain performance and/or detect possible malfunctions. All fuel, oil, hydraulic, air, vacuum, filters, and screens are either cleaned or replaced. See, e.g., 14 C.F.R. pt. 43, App. D (1998) for a com-
completed on the aircraft within the preceding twelve months. Because these airworthiness regulations are clearly safety-related, insurers would understandably want to exclude coverage for losses occurring as a result of aircraft not being in compliance with these regulations.

In Monarch Insurance Co. v. Polytech Industry, Inc., coverage was denied due in part to the lack of a current annual inspection. In that case, the aircraft, which had not been flown for several months, crashed shortly after takeoff thereby destroying the aircraft and injuring all four occupants. In upholding the policy exclusion, the court reasoned that the annual inspection requirement "was obviously designed to protect the insurer from liability for accidents caused by the operation of an unsafe plane." The court added that denying coverage did not violate public policy, not only because the cause of the accident had not been determined, but also because the violation of the FAR inspection requirement relates directly to the safe operation of the aircraft.

The FARs provide that "Standard Airworthiness Certificates remain in effect indefinitely so long as the airplane is maintained in accordance with FAR 43 and FAR 91, unless sooner suspended or revoked by the FAA for some reason." Biehler, supra note 1, § 18, at 29. Part 91 also provides that an aircraft may not be operated unless an annual inspection has been performed within the preceding twelve months. See 14 C.F.R. § 91.409 (a)(1) (1998).

See generally Biehler, supra note 1, § 13, at 23 (quoting Section 601 of the Federal Aviation Act of 1958).

See, e.g., Monarch Ins. Co. v. Polytech Indus. Inc., 655 F. Supp. 1058, 1062 (M.D. Ga. 1987); see also Harlow, supra note 2, 785-90 (summarizing additional cases dealing with the denial of coverage due to the lack of a valid airworthiness certificate).


66 See id. at 1060. In addition, the pilot did not have a current medical certificate nor a biennial flight review as required by the FARs and the insurance policy. See id. at 1060-61. See infra note 97 (setting out requirements for flight reviews).


68 Id. at 1062.

D. Pilot Certification and Qualifications

The following cases explain how the pilots' adherence to Federal Aviation Regulations is incorporated into aircraft insurance policy provisions to limit the risk the insurer assumed. For example, the FARs place many limitations on the flight operations that student pilots may conduct. One such limitation is the absolute prohibition against carrying passengers. Therefore, aircraft insurance policies contain provisions that deny coverage if the student pilot violates this regulation or in any way goes beyond those operations the instructor authorizes.

In *Eastern Aviation and Marine Underwriters, Inc. v. Gilbertson*, a student pilot crashed the airplane he was flying during a landing attempt. Contrary to the FARs, the student was carrying a passenger who was injured as a result of the accident. The insurer denied coverage because the student pilot had operated the aircraft in a manner his instructor had not authorized, which was an excluded use under the policy. Naturally, the court sided with the insurer and held that because the student pilot had not met the requirements of the policy, the flight was outside the scope of coverage.

Moreover, in *United States Fire Insurance Co. v. West Monroe Charter Service, Inc.*, the Louisiana Court of Appeals upheld a policy provision excluding coverage if the pilot did not have a current medical certificate. A medical certificate is required.

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73 See id.
74 See id. at 569.
75 See id.
76 See id. at 568. The applicable policy provision stated that "none of the coverages apply unless [the student] pilot is accompanied by, or has received prior flight approval and briefing from a [certified flight instructor]." Id.
77 See id. at 570.
79 The policy contained the following language:
The aircraft must be operated in flight only by a person shown below who must have a current and proper (1) medical certificate and (2) pilot certificate with necessary ratings, as required by the FAA for each flight. There is no coverage under the policy if the pilot does not meet these requirements.
80 See id.
81 The FARs define a medical certificate is defined in the FARs as "acceptable evidence of physical fitness on a form prescribed by the Administrator."
by the FARs to ensure that a pilot does not have a health condition that will interfere with his ability to operate an aircraft safely. In that case the pilot and his three passengers died in a crash that occurred during a flight in which the pilot's medical certificate had expired. In denying coverage, however, the court noted that the pilot not only failed to possess a current medical certificate, but that there was strong evidence that he would not have been able to obtain one had he tried, due to a high blood pressure condition for which he was being treated at the time.

In Schneider Leasing, Inc. v. United States Aviation Underwriters, Inc., the insurer denied coverage for an accident because the pilot did not have a commercial license, instrument rating, or the minimum number of flight hours, all of which the policy re-

C.F.R. § 1.1 (1998). There are three classes of medical certificates: first, second, and third-class certificates. The first-class certificate has the most stringent medical standards and is therefore required for airline transport pilots. The duration of the first-class certificate is six months. The second-class certificate has a slightly less stringent medical standard and is valid for one year. Second-class certificates are required for any commercial pilot flying for hire such as instructing, crop-spraying, charter, etc. Third-class certificates have the least stringent medical standards and are required for private pilots. The duration of third-class certificates is two years. See, e.g., 14 C.F.R. § 67 (1998) (defining the medical standards and procedures for certification of airmen).

82 For a third-class certificate to be issued, the FARs require that the pilot have no condition that:

1) Makes the person unable to safely perform the duties or exercise the privileges of the airman certificate applied for or held; or

2) May reasonably be expected, for the maximum duration of the airman medical certificate applied for or held, to make the person unable to perform those duties or exercise those privileges.


83 See United States Fire Ins. Co., 504 So. 2d at 95, 98.

84 The pilot's last medical certificate was issued on May 26, 1976. See id. at 96. Basically, a third-class medical certificate is valid for 24 months. The FARs state that a third-class medical certificate expires at the end of the 24th month following the month of the examination date. 14 C.F.R. § 61.23 (c) (1998). The certificate in that case would, therefore, have expired on May 31, 1978. The accident at issue occurred over three years later on July 1, 1981. See United States Fire Ins. Co., 504 So. 2d at 93, 95 (La. Ct. App. 1987). After the medical certificate expired, the pilot was found to be suffering from high blood pressure and had even been hospitalized for treatment in May 1979. See id. at 96. Dr. N. R. Spencer, a local designated medical examiner who provides medical examinations to pilots, testified that the pilot would have been denied a medical certificate based upon the medication he was taking to control his high blood pressure. See id. at 97.

85 555 N.W.2d 838 (Iowa 1996).

86 See infra notes 172-73.
quired.\textsuperscript{87} In that case, the pilot and a passenger were killed when the aircraft crashed shortly after takeoff.\textsuperscript{88} Although that state had an anti-technical statute, the court refused to impose a contribute-to-the-loss standard to the insured’s claim. The court stated that the statute only applied to technical “conditions” or “stipulations” that work to void coverage before the loss occurs and not coverages excluded from inception.\textsuperscript{89} Thus, because the pilot never met the requirements of the policy, the court held that no coverage existed before the loss occurred.\textsuperscript{90}

The court further criticized an earlier Iowa Court of Appeals decision, \textit{Global Aviation Insurance Managers v. Lee},\textsuperscript{91} in which that court used a contribute-to-the-loss standard to provide coverage despite violations of two policy exclusions.\textsuperscript{92} In \textit{Global}, the appellate court held that the term “stipulation” in the statute was not a term of art in the insurance industry, and thus was broad enough to encompass not only warranties, but also exclusions.\textsuperscript{93} Despite the additional public policy arguments that the appellate court advanced,\textsuperscript{94} the Iowa Supreme Court disagreed.\textsuperscript{95}

In light of these cases, policy exclusions can serve the valid purposes of limiting an insurer’s risk and encouraging the insured to comply with safety regulations. The cases in the following section, however, portray some completely arbitrary results

\textsuperscript{87} See Schneider Leasing, 555 N.W.2d at 839-40. The aircraft involved in this case was a twin-engine Beechcraft Baron. The policy’s open pilot clause required a minimum of 350 hours experience for a pilot in command of a multiengine aircraft, in addition to a commercial license with an instrument rating. The pilot flying the aircraft when the accident occurred had only 93 of the required 350 multiengine hours. See \textit{id}.

\textsuperscript{88} See \textit{id}. at 839. Although vehemently contested, various explanations were offered regarding the accident’s cause, including pilot error, mechanical malfunction, and passenger interference. See \textit{id}.

\textsuperscript{89} See \textit{id}. at 842.

\textsuperscript{90} See \textit{id}.

\textsuperscript{91} 368 N.W.2d 209 (Iowa Ct. App. 1985).

\textsuperscript{92} See \textit{id}. at 212. The insured lacked a valid medical certificate. In addition, the aircraft airworthiness certificate was not in force. The cause of the accident, however, was pilot error, because the pilot misjudged his speed and distance while attempting to land on a wet grass strip. See \textit{id}. at 210.

\textsuperscript{93} See \textit{id}. at 211.

\textsuperscript{94} See \textit{id}. at 212. The appellate court also stated that the purpose of the statute was best served by applying it to all provisions of policies, however labeled by the insurer, otherwise an insurer could circumvent the statute by inserting any condition in the policy and call it an “exclusion.” See \textit{id}.

\textsuperscript{95} See Schneider Leasing, 555 N.W.2d at 842.
when the exclusions actually deny coverage for what amounts to nothing more than a technical breach of the policy.

IV. TECHNICAL BREACH OF POLICY PROVISION

In contrast to the previous cases, aircraft accidents have occurred in which, although the insured violated policy provisions, the breach was completely unrelated to the loss. The following cases provide insight into the substantial unfairness of denying coverage when the technical policy breaches do not prejudice the insurer’s interests.

In Economic Aero Club, Inc. v. Avemco Insurance Co., a licensed private pilot, who was current and had met all recency requirements, had an accident solely due to pilot error while flying a small single-engine aircraft. Fortunately, no one was injured in the accident, although the aircraft was a total loss. The insurance company denied coverage on the subsequent claim for recovery because the pilot did not have the current medical certificate required by the policy at the time of the accident. Although the pilot’s health did not contribute to the accident, as evidenced by his being issued a medical certificate four days later, the court nevertheless upheld the exclusion and denied coverage.

That case, however, was one of first impression and the state legislature had not enacted an anti-technical statute. The court mentioned that other courts had adopted contribute-to-the-loss standards absent such a statute on public policy.

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96 540 N.W.2d 644 (S.D. 1995).
97 See id. at 645. In addition to a valid pilot’s license and a current medical certificate, a pilot must meet several other requirements. The FARs mandate that a pilot have a Flight Review every two years. See 14 C.F.R. § 61.56(c) (1998). During the Flight Review, the pilot must satisfactorily demonstrate to a certified flight instructor that the pilot possesses the required level of knowledge and skill to operate the aircraft safely. See 14 C.F.R. § 61.56(a) (1998). In addition, for a pilot to carry passengers, he must have made three takeoffs and landings in a similar aircraft within the preceding 90 days. See 14 C.F.R. § 61.57(c) (1998).
98 See Economic Aero Club, 540 N.W.2d at 645.
99 See id.
100 The pilot held a third-class medical certificate that had expired on July 18, 1990. The accident occurred four months later on November 25, 1990. See id. See also supra notes 81-82 and accompanying text (setting out the purpose and requirements for medical certificates).
101 See Economic Aero Club, 540 N.W. 2d at 645.
102 See id. at 646.
103 See id.
grounds, but stated that it preferred to leave the matter to the legislature.104

The pilot in *National Union Fire Insurance Co. v. Estate of Meyer*105 was likewise flying with an expired medical certificate. Unfortunately, the accident that occurred in *Meyer* had much more tragic results; the pilot and both passengers were killed.106 Although the California Court of Appeals acknowledged that pilot error was the sole cause of the accident, the court upheld the policy provision excluding coverage for lack of a medical certificate and denied coverage.107 In reversing the trial court, which had provided coverage, the appellate court reasoned that no precedent existed upon which it could impose a causal connection requirement; thus the policy had to be interpreted by its plain language.108

Similarly, in *Security Insurance Co. of Hartford v. Andersen*,109 the court denied coverage for an accident claim involving a pilot who did not have a current medical certificate, despite the fact that no evidence was presented to prove the accident was health-related.110 In *Security Insurance*, the Arizona Supreme Court reversed an appellate court decision111 that had allowed coverage by following the modern trend, which requires a causal connection between the breach of a policy provision and the loss.112 The appellate court had stated that many prior decisions held that courts would “not enforce what amount to arbitrary forfeitures of insurance coverage for purely technical reasons beyond those necessary to protect the insurers’ legitimate interests.”113

The Arizona Supreme Court, in overruling the case, stated that it would only enforce conditions causing forfeiture when they were not contrary to public policy. The court, however, drew a distinction between “conditions” and “exclusions” and found that exclusions were not forfeitures and, therefore, would

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104 See id.
106 See id. at 632-33.
107 See id. at 633.
108 See id. at 635-36.
111 See Security Ins., 763 P.2d at 251.
112 See id. at 260-61.
113 Id. at 261.
not be struck down unless they were unconscionable.\textsuperscript{114} The court reasoned that it would uphold such exclusions only if they were specific. In other words, broad exclusions denying coverage when the aircraft is operated in violation of any FAR would render the policy illusory and would be unconscionable because most accidents involve at least one FAR violation.\textsuperscript{115} Specific exclusions such as the one at issue, however, would be upheld.\textsuperscript{116}

The Security Insurance decision begs the question whether specificity alone is enough to prevent an exclusion from being unconscionable. For example, an exclusion that denies coverage for accidents occurring on Wednesdays is specific—although the application of this exclusion would be extremely arbitrary. In a similar context, a Texas court defined the term unconscionable quite differently when it addressed aircraft insurance policy provisions. That court stated that "unconscionable"\textsuperscript{117} is simply the denial of coverage for the breach of a policy provision that contributes in no way to the loss.

The states that allow insurers to deny coverage for these types of technical breaches seem to justify their position based upon the nature of an exclusion. The rationale is that because an exclusion defines what lies outside the policy, giving affect to an exclusion does not have to meet the contribute-to-the-loss standard that warranties for coverage within the policy must meet. One constant theme, which runs throughout these cases, is that the particular cause of the loss that the insurer sought to exclude was totally irrelevant to the covered cause that actually occurred. The next section contains cases with factual scenarios similar to those discussed above, but in which courts apply a contribute-to-the-loss standard. By applying this standard, the courts did not allow the insurers to hide behind arbitrary provisions to deny coverage in such cases.

V. CONTRIBUTE-TO-THE-LOSS STANDARD (DOCTRINE)

The following cases illustrate that states disfavoring technical breaches do not give exclusions treatment distinct from that given warranties. Just because a contribute-to-the-loss standard is adopted in a given case does not, however, mean that the insured is guaranteed coverage. This is because most states place

\textsuperscript{114}See Security Ins., 763 P.2d at 250.
\textsuperscript{115}See id. at 250-51.
\textsuperscript{116}See id. at 250.
the burden on the insured to prove the breach did not contribute to the loss. Therefore, regardless of whether or not the loss is related to the breach, if the insured cannot meet its burden of proof, no coverage is provided.

A. APPLYING THE CONTRIBUTE-TO-THE-LOSS STANDARD

In Bayers v. Omni Aviation Managers, Inc.,118 the insurer denied coverage because the pilot’s medical certificate had expired two months before the accident.119 Because the pilot’s health was in no way related to the accident,120 the court allowed coverage. It reasoned that “[t]o deny the insured the coverage he had paid for where merely a technical breach occurred would be unfair.”121 The court added that the insurer has the ability to guard against the risk of loss arising from a pilot in bad health, however, the pilot’s lack of a medical certificate in the case at issue did not increase the insurer’s risk at all.122 In following what it called the “trend of modern authority” the court took note of two similar cases123 that also required a causal connection between the breach of a policy provision and the loss.124 In noting that the majority of other decisions were to the contrary, the court stated that only their number, not their reasoning, lends support to the insurer’s position.125

Similarly, in South Carolina Insurance Guaranty Ass’n v. Broach,126 a student pilot had an accident during a solo flight not specifically approved by the instructor.127 Although the student was licensed to fly solo, flights not specifically authorized by a

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119 See id. at 1206.
120 The aircraft crashed into an oil tank at a petroleum refinery immediately after takeoff. The aircraft was destroyed and the pilot was killed. See id. at 1205.
121 Id. at 1207.
122 See id.
123 See, e.g., South Carolina Ins. Co. v. Collins, 237 S.E.2d 358 (S.C. 1977) (holding coverage cannot be denied when there is no causal connection between the accident and the insured’s lack of medical certificate); Avemco Ins. Co. v. Chung, 388 F. Supp. 142 (D. Haw. 1975) (ruling insured’s failure to possess a current medical certificate would not void coverage unless such failure caused the loss).
124 See Bayers, 510 F. Supp. at 1207.
125 See id. (citing South Carolina Ins. Co. v. Collins, 237 S.E.2d 358, 362 (S.C. 1977)).
126 353 S.E.2d 450 (S.C. 1987).
127 See id. at 451.
flight instructor were excluded from coverage.\textsuperscript{128} Embracing
the modern trend, the court held that the insurer could deny
coverage only if the breach of the policy provision contributed
to the loss. Explaining the rationale of its position, the court
stated that "when the parties made the contract of insurance,
they were not inserting a mere arbitrary provision, but that it
was the purpose of the insurance company to relieve itself of
liability from accidents caused by the excluded provision."\textsuperscript{129}

The insurer in \textit{Pickett v. Woods}\textsuperscript{130} denied coverage when the
insured crashed his aircraft during an attempted landing in bad
weather.\textsuperscript{131} The court based its denial upon a policy exclu-
sion\textsuperscript{132} for failure to have an annual inspection performed on
the aircraft within the preceding twelve months, even though
the accident's cause was clearly pilot error.\textsuperscript{133} The appellate
court reversed the trial court's denial of coverage by applying
the state's newly-enacted anti-technical statute.\textsuperscript{134} The fact that
the provision in question was an \textit{exclusion} did not burden the
appellate court in its decision because it viewed warranties, con-
ditions, and exclusions as mere labels that the insurer gave to
various policy \textit{provisions}.\textsuperscript{135} The court reasoned that the statute
explicitly applied to all policy \textit{provisions} because the statute was
"designed to prevent the insurer from avoiding coverage on a

\textsuperscript{128} See id. The relevant policy language stated that "[all] operations of an air-
craft by a student pilot must be under the direct supervision of a properly quali-
fied FAA certified flight instructor, who shall have specifically approved each
flight undertaken by the student prior to takeoff." \textit{Id.}
\textsuperscript{129} \textit{Id.} (quoting South Carolina Ins. Co. v. Collins, 237 S.E.2d 358, 361-62 (S.C.
1977)) (emphasis added).
\textsuperscript{130} 404 So. 2d 1152 (Fla. Dist. Ct. App. 1981).
\textsuperscript{131} See id. at 1153.
\textsuperscript{132} The policy provision stated that coverage did not apply to any insured "who
operates or permits the operation of the aircraft, while in flight, unless its airwor-
thiness certificate is in full force and effect." \textit{Id.} at 1152. Because the insured
had failed to have an annual inspection performed on the aircraft, the airworthi-
ness certificate was not in full force and effect at the time of the accident. \textit{See id.}
at 1153.
\textsuperscript{133} See \textit{id.} at 1153.
\textsuperscript{134} The Florida statute, which the \textit{Pickett} Court applied, was enacted in 1979
and provides:
A breach or violation by the insured of any warranty, condition, or
provision of any wet marine or transportation insurance policy,
contract of insurance, endorsement, or application therefore shall
not render void the policy or contract, or constitute a defense to a
loss thereon, unless such breach or violation increased the hazard
by any means within the control of the insured.
\textit{Id.} at 1152-53 (citing Fla. Stat. ch. 627.409(2)(1996)).
\textsuperscript{135} See \textit{id.} at 1153.
technical omission playing no part in the loss."\(^{136}\) Therefore, the appellate court remanded the case to the trial court to determine whether the lack of an annual inspection was in any way related to the loss.\(^{137}\)

In *Puckett v. United States Fire Insurance Co.*,\(^{138}\) an accident occurred in which the aircraft had not had an annual inspection within the preceding twelve months. This precluded the airworthiness certificate from being in full force and effect as required by the insurance policy.\(^{139}\) Nevertheless, because the accident was solely due to pilot error, the Texas Supreme Court refused to deny coverage on a mere technicality. The court stated that numerous maintenance requirements necessary to keep the certificate valid were so highly technical in nature that it was virtually impossible for the insured to know the status of the certificate at any given time.\(^{140}\) Further, the court held that to allow the insurer to avoid liability on a technicality that does not contribute to the loss would be unconscionable. The court concluded that if it "held otherwise, it would actually be to the insurer’s advantage that the insured failed to [have an annual inspection]. In such event, the insurer would collect a premium but would have no risk exposure because the policy would no longer be effective."\(^{141}\)

In *American States Insurance Co. v. Byerly Aviation, Inc.*,\(^{142}\) the insurer denied coverage for an accident because the pilot flying the aircraft was not one of the pilots named in the policy.\(^{143}\) Despite the fact that the crash was the result of a catastrophic mechanical failure,\(^{144}\) the insurer claimed that coverage was excluded because someone other than a named pilot flew the aircraft.\(^{145}\) Allowing coverage, the court stated that the only

\(^{136}\) *Id.*

\(^{137}\) See *id.*

\(^{138}\) 678 S.W.2d 936 (Tex. 1984).

\(^{139}\) See *id.* at 937.

\(^{140}\) See *id.* at 938.

\(^{141}\) *Id.* at 938 (citing *Pickett v. Woods*, 404 So. 2d 1152 (Fla. Dist. Ct. App. 1981)).


\(^{143}\) See *id.* at 968.

\(^{144}\) The aircraft involved in this case was a helicopter. The accident was the result of the main rotor becoming detached and caused the crash that killed the pilot and his passenger. See *id.* at 967-68.

\(^{145}\) The relevant provision states that "[t]his policy does not apply . . . while the aircraft is in flight and . . . operated by any pilot other than as specified in the declarations." *Id.* at 968. The pilot who was flying the aircraft at the time of the accident was not one of those specified in the declarations. See *id.*
reasonable purpose for the exclusion was to limit the insurer's liability resulting from negligent, unskilled pilots, of which there was absolutely no evidence. Conversely, the insured paid premiums and the insurer agreed to cover certain risks, one of which was loss due to mechanical failure.\textsuperscript{146} Because the nonnamed pilot did not prejudice the insurer, and the casualty that occurred was one indeed covered under the policy, invoking such an exclusion would provide the insurer with a "pure windfall of non-liability."\textsuperscript{147} Finally, the court concluded that because a causal connection is required "for coverage to be afforded under an insuring agreement, it would seem grossly unfair not to require such connection between the loss which occurs and the exclusion, in order for the insurer to successfully escape coverage under an exclusion."\textsuperscript{148}

Just because a state subscribes to the contribute-to-the-loss standard does not, however, mean that the insured will prevail on a claim for coverage that has been excluded because of the insured's breach. In \textit{Ideal Mutual Insurance Co. v. Last Days Evangelical Ass'n, Inc.},\textsuperscript{149} the trial court determined that the policy provided no coverage for an accident in which the pilot lacked the requisite number of hours that the policy required.\textsuperscript{150} On appeal, the case was remanded with the burden placed on the insured to prove that the pilot's insufficient hours did not contribute to the loss.\textsuperscript{151} The burden of proving that pilot error was not the cause of the crash would have been particularly problematic for the insured because the eight-passenger aircraft was carrying twelve people at the time of the accident.\textsuperscript{152}

B. CASES IN WHICH COVERAGE WAS DENIED

As some of the cases in the previous section indicated, the insured is not necessarily entitled to a smooth ride simply because a contribute-to-the-loss standard is adopted. Indeed, in

\textsuperscript{146} See id. at 970.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} 783 F.2d 1234 (5th Cir. 1986).
\textsuperscript{150} See id. at 1234.
\textsuperscript{151} See id. at 1241.
\textsuperscript{152} The insurer denied coverage alleging that the aircraft crashed as a result of being overloaded. See id. at 1236. The damaged aircraft involved was a Cessna 414- a twin-engine aircraft capable of carrying a pilot and seven passengers. See id.
the cases that follow, the insured were actually denied coverage despite the courts' adhering to the modern trend.

In O'Connor v. Proprietors Insurance Co., the insured failed to have an annual inspection performed when due. But, in that case, no evidence of the accident's cause was present. Applying a contribute-to-the-loss standard, the court stated that public policy should preclude applying safety-related policy exclusion only when the insured can show that the violation was not a cause of the accident. Therefore, because the insured failed to prove that the missing current annual inspection did not contribute to the loss in that case, the court denied coverage.

Accordingly, in Gardner Trucking Co. v. South Carolina Insurance Guaranty Ass'n, the South Carolina Supreme Court upheld two policy exclusions that denied coverage. In Gardner, one exclusion provided that the aircraft was not to be flown unless the airworthiness certificate was in full force and effect. Because an annual inspection had not been performed on the aircraft within the preceding twelve months, that provision was violated. Despite the fact that the annual inspection had

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154 See id. at 284. Although fifteen months had elapsed since the last annual inspection, less than twelve months had passed since the last 100-hour inspection, which is an identical inspection. See id. at 283-84. The insured unsuccessfully argued that the denial of coverage due to the language of the logbook entry denoting the inspection as a "100-hour" rather than an "annual" inspection was based upon a mere technicality. See id. at 284. The primary distinction between these two types of inspections is in the person authorized to perform them. See id. at 285. A person holding an airframe and powerplant (A&P) mechanic license may perform a 100-hour inspection, however, an A&P mechanic that, in addition, holds an FAA Inspection Authorization (IA) must perform an annual inspection. The FAA imposes special knowledge and experience requirements on IA applicants which are over and above those required for A&P mechanics. See id. at 285. IA requirements are more fully specified in 14 C.F.R. § 65.91 (1997). See id.
155 See id. at 284.
156 See id. at 286.
158 See supra notes 47.
159 See Gardner, 376 S.E.2d at 261-62.
160 See supra note 61.

161 The FARs provide that "no person may operate an aircraft unless, within the preceding 12 calendar months, it has had . . . [a]n annual inspection in accordance with part 43 of this chapter and has been approved for return to service by a person authorized by § 43.7 of this chapter." 14 C.F.R. § 91.409(a)(1) (1997).
162 The FARs provide that an airworthiness certificate is only effective "as long as the maintenance, preventive maintenance, and alternations are performed in
not been performed within the required time period, the owner in \textit{Gardner} allowed the aircraft to be flown, at which time the landing gear malfunctioned on landing and damaged the aircraft\textsuperscript{163}.

Obviously, the primary purpose of aircraft inspection is to detect and prevent mechanical malfunctions. During an annual inspection, an aircraft with retractable landing gear is placed on jacks to facilitate a thorough inspection of the landing gear system. In addition to checking the landing gear's normal operation, the inspector operates the emergency extension system to ensure a backup means of extension is available if necessary\textsuperscript{164}. In \textit{Gardner}, the court upheld the exclusion not only because it was valid, but also because the insured offered no proof that the failure to properly maintain the aircraft did not contribute to the loss\textsuperscript{165}.

The second exclusion that the \textit{Gardner} court upheld dealt with pilot qualifications. The policy provided that no coverage was available unless the pilot had a minimum of 150 hours flying aircraft with retractable landing gear and twenty-five hours in the same make and model as the insured aircraft\textsuperscript{166}. These requirements directly relate to the risk the insurer assumed, because the more experience a pilot has with retractable landing gear equipped aircraft, the better he is able to cope with landing gear malfunctions and other related emergency situations while flying that type of aircraft\textsuperscript{167}. Notwithstanding the minimum time requirement, the pilot in \textit{Gardner} had only thirty hours of retractable time and only ten hours in the same make and model as the insured aircraft\textsuperscript{168}. Regarding this exclusion, the insured did not dispute that the pilot's lack of experience was causally connected to the loss\textsuperscript{169}.

Likewise, policy exclusions that deny coverage if the pilot is not properly rated for the existing flight conditions also serve the valid purpose of limiting the insurer's risk. Illustrative evidence of this point is \textit{National Insurance Underwriters v. Mark}\textsuperscript{170}.

\textsuperscript{163} See \textit{Gardner}, 376 S.E.2d at 236.
\textsuperscript{165} See \textit{Gardner}, 376 S.E.2d at 238.
\textsuperscript{166} See \textit{id}. at 261.
\textsuperscript{167} See, e.g., \textit{Speiser supra} note 3, § 22:5 at 20.
\textsuperscript{168} See \textit{Gardner} 376 S.E.2d at 262.
\textsuperscript{169} See \textit{id}.
\textsuperscript{170} 704 F. Supp. 1033 (D. Colo. 1989).
which deals with an accident involving a VFR-rated\textsuperscript{171} pilot attempting to operate an aircraft in IFR\textsuperscript{172} conditions, for which he was not qualified.\textsuperscript{173} In the \textit{National Insurance} case, the pilot and his passenger were both killed when the pilot attempted to takeoff in poor weather conditions, which included one-quarter mile visibility and indefinite ceilings due to fog.\textsuperscript{174} Denying coverage, the United States District Court stated that the policy exclusion was clearly safety related and not contrary to public policy.\textsuperscript{175} In light of the weather conditions, which demanded skills beyond those that the pilot possessed, the court did not view the operation of the pilot certification exclusion as a mere technical breach.\textsuperscript{176} Despite applying a contribute-to-the-loss standard, the court denied coverage.

These cases demonstrate that applying a contribute-to-the-loss standard can reconcile the interests of both the insurer and the insured. The insurance policy for which the insured has paid will provide coverage for losses as long as such losses are the result of a covered risk. Conversely, the risks the insurer seeks to avoid through the use of valid exclusions will deny coverage if the forbidden activity causes a loss, thereby serving the exclusion's purpose.

\textsuperscript{171} VFR, or Visual Flight Rules, are "[r]ules that govern the procedures for conducting flight under visual conditions. The term 'VFR' is also used in the United States to indicate weather conditions that are equal to or greater than minimum VFR requirements." U.S. DEP'T OF TRANSP., FED. AVIATION ADMIN., AIRMAN'S INFORMATION MANUAL, PILOT/CONTROLLER GLOSSARY, V-2, V-3 (1995) [hereinafter AIM]. Basic VFR weather minimums are detailed in the FARs and generally prohibit flight unless minimum visibility and distance from clouds can be maintained. \textit{See} 14 C.F.R. § 91.155 (1997). In essence, these regulations limit pilots, without an instrument rating, to flight conditions in which control and navigation of the aircraft can be accomplished primarily by visual ground references.

\textsuperscript{172} IFR, or Instrument Flight Rules, are "[a] set of rules governing the conduct of flight under instrument meteorological conditions." AIM I-2. Instrument meteorological conditions are further defined as "[m]eteorological conditions expressed in terms of visibility, distance from cloud, and ceiling less than the minima specified for visual meteorological conditions." \textit{Id.} at I-2, I-3. Flight in "instrument" conditions require the pilot to control and navigate the aircraft solely by reference to the aircraft instruments and avionics and are therefore restricted to pilots who have had additional training and hold an Instrument Rating. \textit{See generally} 14 C.F.R. § 61.55 (1997) (setting out specific training requirements).

\textsuperscript{173} \textit{See National Ins.}, 704 F. Supp. at 1034.

\textsuperscript{174} \textit{See id.}

\textsuperscript{175} \textit{See id.} at 1035.

\textsuperscript{176} \textit{See id.}
C. BURDEN OF PROOF

Most of the states, which have adopted the contribute-to-the-loss standard, have placed the burden on the insured to prove that the breach was not related to the loss. If the insured cannot prove beyond a preponderance of the evidence that the breach did not cause the accident, then coverage is denied. Similarly, if the cause of the accident remains unknown, the insured is unable to sustain the burden of proof and no coverage is provided. Texas and South Carolina have, however, elected to place the burden of proof on the insurer in all such contribute-to-the-loss cases.177

D. PUBLIC POLICY

A common proposition is that “[i]t is the fundamental right of the insurer to decide what it will and what it will not insure against, providing that the provision is not against public policy.”178 In the aviation context, however, policy provisions that deny coverage for a single violation of the voluminous FARs may indeed violate public policy. The reason is that such provisions, in effect, allow the insurer to receive premiums when it is not incurring any realistic risk of liability.179

Insurance companies have a valid reason to promote adherence to FARs when violations would increase their risks. That is not, however, the primary purpose of aircraft insurance policies; their primary purpose is to provide coverage when no coverage otherwise exists. The FAA's primary function is to promote and enforce FARs. Insurers should be commended for promoting adherence to FARs by aviators, especially when such promotion is done in conjunction with limiting their own liability for losses that result from violations. But for situations in which the violation does not contribute to the loss, that motive should not overshadow the basic purpose of insurance—to provide coverage when no coverage exists.

177 See, e.g., Fidelity & Cas. Co. v. Burts Bros., Inc., 744 S.W.2d 219 (holding that a pilot's lack of flight experience must be causally connected to the accident before exclusion can deny coverage); South Carolina Ins. Guaranty Ass'n v. Broach, 353 S.E.2d 450 (S.C. 1987) (holding that an exclusion denying coverage for a student pilot not flying under the direct supervision of flight instructor must be causally connected to crash).


179 See O'Connor, 696 P.2d at 285.
VI. CONCLUSION

In the past, insurance companies utilized warranties, representations, and conditions to protect themselves against certain risks. When insureds breached these provisions, insurers did not have to pay, regardless of whether the breach was material or contributed to the loss. Then states enacted contribute-to-the-loss statutes to counter the harsh result of forfeiture when the loss was unrelated to the provision breach. In the aviation insurance industry, insurers have sought to avoid the contribute-to-the-loss standard by labeling some of these same policy provisions as exclusions. By doing so, insurers argue that coverage was not forfeited due to the breach because coverage never existed for the excluded activity.

Not surprisingly, claims that the aircraft never had coverage are puzzling. Obviously, if the premium has been paid and a policy has been issued, some coverage must have resulted. After the policy has been issued, the aircraft undoubtedly has coverage while it is sitting static on the ramp. Therefore, the aircraft should remain covered unless that coverage is forfeited for some reason, i.e., through the insured’s operating the aircraft for an excluded use. It is true that some uses or events may be excluded from coverage from the policy’s and particular coverage cannot be forfeited because it never existed. If the exclusion is given effect, however, the valid coverage on the aircraft that existed before the breach is forfeited.

The contribute-to-the-loss standard is the fairest solution to the dilemma regarding aircraft insurance claims. The cases in which this modern trend was applied clearly did not prejudice the interests of either party. When an insured breaches a policy provision and a loss occurs, the insurer is not prejudiced if the evidence proves that the breach was related to the loss because no coverage will be provided. Additionally, the insurer is not prejudiced if the cause of the loss remains unknown, because no coverage is provided since the insured failed to prove its case. If the insured successfully proves that the policy provision breach was totally unrelated to the loss, then the exclusion and the purpose it serves become irrelevant. No prejudice results to either party applying this modern standard, unless the insurer’s interests are prejudiced by limiting its ability to arbitrarily avoid paying certain claims.

Certainly a pilot is negligent if he forgets to renew his medical certificate or have an annual inspection when due, but these
events only occur every two years and one year respectively. Therefore, it is not so unusual that the insured might forget these events at one point or another. After all, the precise reason for which insurance is purchased is to protect the insured, as well as others, from the occasional negligent acts of the insured.